

Commissioner, Indiana Department of Environmental Management

v.

Charles O’Gara d/b/a Highway 44 Auto Parts
Johnson County, Indiana
2016 OEA 13, (13-S-E-4661)

OFFICIAL SHORT CITATION NAME: When referring to 2016 OEA 13 cite this case as
Charles O’Gara, 2016 OEA 13.

TOPICS:

dismissal

discretion

default

late filing

petition for review

Notice and Order of the Commissioner of the Department of Environmental Management

Commissioner’s Order (CO)

I.C. § 4-21.5-3-7(a)(3)(A)

I.C. § 13-30-3

I.C. § 13-30-3-5

Trial Rule 60

Wayne Metal Products Company, Inc. v. IDEM, 721 N.E.2d 316

Huntington Nat’l Bank v. Car-X Assoc. Corp., 39 N.E.3d 652 (Ind. 2015)

PRESIDING ENVIRONMENTAL LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: Kyle Burns, Esq.

Respondent: Thomas O’Gara

ORDER ISSUED:

May 9, 2016

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

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...

Failure to properly submit a request for review, before the twentieth day following receipt of this Order of the Commissioner, waives your right to administrative review of this Order . . .

4. The Respondent sent a letter to IDEM with documentation of the efforts he had made to comply with IDEM’s order.
5. IDEM received this letter on May 6, 2013 and did not respond until June 17, 2013. At this time, IDEM notified the Respondent that the CO had become effective on May 20, 2013.
6. The Office of Environmental Adjudication (the OEA) received the Respondent’s petition for review on June 24, 2013. There was no indication in the Petition for Review or attachments as to when the CO was served upon the Respondent or when the Respondent received it.
7. A prehearing conference was held on July 23, 2013. The ELJ declined to rule as to whether the petition for administrative review was timely filed, as the record of proceeding lacked factual support on this issue, as required in I.C. § 4-21.5-3-14. Thus, at the prehearing conference, the ELJ instructed the parties that a dispositive motion be filed, so that all parties would be afforded notice and opportunity to be heard on this fact-sensitive issue.
8. IDEM filed its Motion to Dismiss on August 20, 2013. After several unopposed motions for extensions of time, with the parties’ consent, briefing of the motion was stayed until January 11, 2016. The Respondent filed his response on April 11, 2016 and IDEM filed its reply on May 2, 2016.

CONCLUSIONS OF LAW

1. The OEA has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) pursuant to I.C. § 4-21.5-7, *et seq.*
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. IDEM argues that the Respondent should be dismissed for failing to file his petition for review on time. I.C. § 4-21.5-3-7(a)(3)(A) requires that a petition for review must be filed “within fifteen (15) days after the person is given notice of the order or *any longer period set by statute;...*”¹

¹ Emphasis added.

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4. The CO was issued under IDEM’s authority set forth in I.C. § 13-30-3 *et seq.* Specifically, I.C. § 13-30-3-5(a)² sets the deadline for filing a petition for review of a CO before the twentieth day of receipt.
5. The Court of Appeals, in *Wayne Metal Products Company, Inc. v. Indiana Department of Environmental Management*, 721 N.E.2d 316, 317 (Ind. Ct. App. 1999) held that the longer deadline set out in Section 13-30-3-5(a) applies rather than the fifteen day deadline set out in I.C. § 4-21.5-3-7 because section 4-21.5-3-7(a)(3)(A) states that a petition for review must be filed within fifteen days or “any longer period set by statute.” As I.C. § 13-30-3-5 allows for a longer time period, the petition for review should have been filed within twenty (20) days of the Respondent’s receipt of the CO. Further, the Court held that “timely filing is a jurisdictional matter.” *Id.* at 319.
6. The CO was issued on April 29, 2013. The Respondent received it April 30, 2013. The petition for review was due no later than May 19, 2013. There is no question that the Respondent did not timely file the petition for review.
7. The Respondent points to *Huntington Nat’l Bank v. Car-X Assoc. Corp.*, 39 N.E.3d 652 (Ind. 2015) as support for its contention that the OEA can excuse the Respondent’s late filing. However, *Car-X* relies on Ind. Trial Rule 60, which gives the judge discretion to find that there was excusable neglect. Reliance on this case is misplaced. The OEA has no discretion under I.C. § 4-21.5-3-7 to extend the period for filing a petition for review.
8. It is evident that the Respondent wanted to petition for review of this matter and the OEA sympathizes with the Respondent’s difficulties in navigating the administrative appeals process. However, the CO contained instructions on how to file an appeal and clearly states that the petition for review must be filed with the OEA. The petition for review was filed too late and the OEA has no choice but to grant IDEM’s motion to dismiss.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Indiana Department of Environmental Management’s Motion to Dismiss the Petition for Review is **GRANTED**. The Petition for Review is hereby **DISMISSED**.

² (a) Except as otherwise provided in:

- (1) a notice issued under section 4 of this chapter; or
- (2) a law relating to emergency orders;

An order of the commissioner under this chapter takes effect twenty (20) days after the alleged violator receives the notice, unless the alleged violator requests under subsection (b) a review of the order before the twentieth day after receiving the notice.

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You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 23rd day of May, 2016 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge